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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL BRANDON MATLOCK, Defendant and Appellant.	C085563 (Super. Ct. No. 17CF00719)

A jury found defendant Michael Brandon Matlock guilty of first degree burglary, looting by committing second degree burglary during a state of emergency (looting), and auto theft. The trial court found true an allegation that defendant previously served a term in prison and sentenced him to an aggregate term of eight years four months in state prison. The court suspended execution of that sentence, but defendant violated his probation and is now serving eight years four months in state prison.

On appeal, defendant contends the trial court erred in refusing to grant his motion for a change of venue prior to jury selection. He also contends the trial court erred in

sentencing him to consecutive terms on his convictions for looting and auto theft. Finding no error, we affirm the judgment of the trial court.

I. BACKGROUND

A. Underlying Facts/Charges

On February 12 and 13, 2017, a state of emergency had been declared for Oroville and surrounding areas, and Donald Sherwood and his family were directed to evacuate their home. A day after evacuating, the Sherwood family returned to collect more of their essential belongings. As they approached their home, Sherwood saw the door to his shop, a building about 30 feet from the house, had been pried open. Once inside the shop he realized that his Honda quadrunner and trailer were missing. Sherwood's wife told him someone had been in the house; the front door was pried open and damaged.

Inside the house, the Sherwoods were missing jewelry boxes, a gaming console, an ice chest, hunting packs, and some ball caps. They also were missing a large gun safe, which they kept in the master bedroom. It appeared the safe had been dragged out of the house. Inside the house they also found the hand truck they usually kept in the shop, it was bent in half as if someone tried to lift something heavy with it.

Sherwood contacted a California Highway Patrol officer. Sherwood told him the marks on his front lawn indicated the gun safe was on the trailer, being towed behind the quadrunner.

Meanwhile, Jeromy Sannar and Alex Bumgarner, both of whom work for the Department of Water Resources, were patrolling the levee system along the Feather River. Because of the evacuation, there was minimal traffic. They saw a quadrunner pulling a trailer with a large gun safe. The truck Sannar was driving was equipped with special lighting, used to inspect the levees, so they were able to see the person driving the quadrunner—it was defendant and he looked surprised to see them.

Sannar and Bumgarner approached defendant, he motioned for them to go around, but they pulled up alongside him. Another vehicle, one that had been following the

quadrunner, went around Sannar and Bumgarner and repeatedly tried to slow them down. The other vehicle parked, Sannar and Bumgarner passed it and saw the car was full of stuff.

Sannar continued to follow the quadrunner until it became stuck in gravel. Defendant then tried to unhitch the trailer, to no avail, so he left on foot. Sannar contacted California Highway Patrol and they returned to their patrol of the river.

The quadrunner, trailer, and gun safe were Sherwood's and defendant was identified as the person who took them.

The People charged defendant with first degree residential burglary, looting, and vehicle theft. The People also alleged defendant previously served a term in prison. Defendant pleaded not guilty to the charges. Before trial, defendant moved for a change of venue. In support of his motion, defendant submitted 10 articles discussing the burglaries that occurred during the evacuation. Six of those articles were published in February 2017, and four were published in May 2017. Seven of the articles described defendant's criminal conduct, five also identified defendant by name. The remaining articles discussed the criminal activity during the evacuation generally, including the District Attorney's statement that people who were taking advantage of the " 'community-wide disaster' " were " 'the lowest of the low' " and would be sent to prison.

The trial court denied defendant's motion.

B. Jury Selection/Trial/Verdict/Sentencing

The parties went on to select a jury. While questioning the first 12 potential jurors, three indicated they could not be fair or impartial because of the circumstances surrounding the state of emergency in Oroville and related evacuations (potential jurors Borts, Lukes, and Donati). Those jurors were excused by the court for cause. Potential jurors Small and Yates indicated they were evacuated but could be fair. Counsel then exercised several peremptory challenges; the People excused potential juror Yates.

After the court added new potential jurors to the petite venire, defense counsel said, "we know the evacuation was a scary time . . . my client is charged with committing a crime during the state of emergency . . . . Can the seven of you be fair to my client . . . ?" The seven new potential jurors responded in the affirmative. Counsel then exercised four more peremptory challenges; the People excused potential juror Small.

With each addition to the petite venire, the potential jurors were asked whether they could be fair given the unique circumstances of defendant's crimes. And each time, the new potential jurors indicated they could: None had been evacuated and many were not from the Oroville area.

One potential juror had been subject to the evacuation but was out of town when it happened, so they "missed the chaos." Another knew someone who was evacuated but believed she could be fair. Neither was excused by counsel in their final peremptory challenges. The jury was sworn in, no objection was raised.

The jury found defendant guilty as charged and found true the allegation he committed a burglary during a state of emergency. The trial court subsequently found true the allegation that defendant served a prior prison term. The trial court sentenced defendant to an aggregate term of eight years four months in state prison. The court then found unusual circumstances, suspended execution of the sentence, and granted defendant probation. Defendant filed a notice of appeal. Approximately eight months later, defendant admitted to violating his probation and the sentence was executed.

II. DISCUSSION

A. Motion to Change Venue

Defendant contends the trial court erred in denying his motion to change venue. We are not persuaded.

"A motion for change of venue must be granted when 'there is a reasonable likelihood that a fair and impartial trial cannot be had in the county' in which the defendant is charged. ([Pen. Code,]§ 1033, subd. (a).)" (*People v. Famalaro* (2011)

52 Cal.4th 1, 21 (*Famalaro*).)[1] "The phrase 'reasonable likelihood' in this context 'means something less than "more probable than not," ' and 'something more than merely "possible." ' [Citation.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 523 (*Proctor*).) "Both the trial court's initial venue determination and our independent evaluation are based on a consideration of five factors: '(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.' [Citations.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394.)

"On appeal, a successful challenge to a trial court's denial of the motion must show both error and prejudice, that is, that 'at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had. [Citations.]' [Citation]. Although we will sustain the trial court's determination of the relevant facts if supported by substantial evidence, ' "[w]e independently review the court's ultimate determination of the reasonable likelihood of an unfair trial." ' [Citation.]" (*Famalaro, supra*, 52 Cal.4th at p. 21.)

Here, defendant was charged with property crimes. He committed them during a state of emergency, but they were still only property crimes. Thus, the nature and gravity of the charged offenses were not in the class of crimes requiring a change of venue. (See *People v. Rountree* (2013) 56 Cal.4th 823, 837-838 [capital murder is the "most serious" crime but does not require a change of venue].)

Similarly, the media coverage of defendant's crimes was minimal: 10 articles about crimes committed during the state of emergency, and seven articles describing defendant's criminal conduct, five of which mentioned defendant by name. This is not the type of pervasive and inflammatory publicity that saturates a county, rendering the

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[1] Undesignated statutory references are to the Penal Code.

jury pool impossibly tainted. (See *People v. Leonard, supra*, 40 Cal.4th at p. 1395.) Six of the articles were published during and immediately following the state of emergency, the rest were published months later and were predominantly factual, only describing the crimes committed.

The parties agree Butte County's population is approximately 225,000 people. According to the California Supreme Court, a population of 200,000 people is considered a "moderately-sized community," not an isolated and small county. (*People v. Webb* (1993) 6 Cal.4th 494, 514.) As such, the size of Butte County does not support defendant's claim his trial should have been moved to another county. (*Ibid.*)

Finally, neither defendant nor the victim have particular prominence or celebrity in Butte County. In sum, on this record, we conclude the trial court did not err in denying defendant's motion for a change of venue.

Defendant also fails to show that he, in fact, did not receive a fair and impartial trial. (See *Proctor, supra*, 4 Cal.4th at p. 523.) "With respect to this second part of the showing, we examine the voir dire of the jurors to determine whether the pretrial publicity had a prejudicial effect on the jury. [Citation.]" (*People v. Harris* (2013) 57 Cal.4th 804, 830-831.)

During voir dire, those jurors who indicated they could not be fair or impartial because of the circumstances surrounding defendant's crimes were excused by the court for cause. Two potential jurors who indicated they were impacted by the state of emergency but could still remain impartial were challenged by the People. Those jurors who indicated they knew something about defendant's case also were excused.

The 12 seated jurors all indicated they could be fair and impartial and there was no evidence any of them knew anything about the specific facts of defendant's case. That the jurors likely knew something about the state of emergency in Oroville during February 2017, does not compel a change of venue. (See, e.g., *Famalaro, supra*, 52 Cal.4th at p. 31 [" 'The relevant question is not whether the community remembered

the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant' "]; *People v. Rountree, supra*, 56 Cal.4th at p. 840 [eight of the 12 jurors had heard something about the case].)

Defendant challenges the veracity of the jurors who said, under oath, they could be fair and impartial. He argues there was a "generalized fear" in the community during the state of emergency and "animus towards those who took advantage of the situation." That is evident, he claims, by the number of people who expressed their bias during voir dire. Only three potential jurors expressed bias against defendant during voir dire, one of them because he actually knew Jeromy Sannar and Sannar's family. This is not the sort of pervasive bias that may cause a court to "discount a juror's claim to be untouched by publicity." (*People v. Prince* (2007) 40 Cal.4th 1179, 1215.)

In sum, defendant has failed to establish error as well as prejudice and his claim on appeal fails accordingly.

B. Section 654

The trial court sentenced defendant to six years for his first degree burglary conviction and consecutive sentences of eight months each for his second degree burglary and auto theft convictions. Defendant contends the trial court was required to stay the sentences for his second degree burglary and auto theft convictions pursuant to section 654. We find no error.

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses, but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

" 'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]' [Citation.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

"The defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. [Citation.]" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

Defendant argues "the only reasonable conclusion is that both the second[ ]degree burglary of Sherwood's shop and the theft of the quad and trailer were committed solely to facilitate [defendant's] single criminal objective of burglarizing Sherwood's house." We disagree. It is equally reasonable that, based on the evidence, defendant broke into the home to steal the personal items in the home, including the gun safe, and broke into the shop specifically to steal the quadrunner and the trailer. That he used the stolen quadrunner and trailer to transport the gun safe does not mean he could *only* have stolen them to complete the crime of stealing the gun safe.

We find substantial evidence supports the sentence imposed by the trial court.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

ROBIE, Acting P. J.

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DUARTE, J.